Office - Supreme Court, U.S.
FILED
NOV 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-631

# In the Supreme Court of the United States

OCTOBER TERM, 1982

HERBERT W. TIMMS, dba PETROL EXPRESS
ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

# In the Supreme Court of the United States

OCTOBER TERM, 1982

---

No. 82-631

HERBERT W. TIMMS, dba PETROL EXPRESS
ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

---

The question presented in this federal income tax case is whether a compromise agreement between petitioners and the Internal Revenue Service, settling a dispute over the employment status of certain individuals working for petitioners, did not entitle petitioners to a refund of the amounts paid pursuant to the compromise agreement with respect to the taxable years 1970 through 1976.

1. The pertinent facts may be summarized as follows: In 1974, petitioners brought suit for a refund of federal employment taxes on the ground that certain area and service station managers working for petitioners were independent contractors for federal employment tax purposes. The government counterclaimed for additional employment taxes. On December 1, 1977 petitioners submitted an offer in compromise, which was finally accepted by the

government on January 12, 1978. The compromise settled petitioners' disputed tax liability for the taxable years 1970 through 1976 for the fixed sum of $545,912.68, and bound petitioners to treat the individuals as employees from and after January 1, 1977 (Pet. App. A-3, A-17). One of the numbered paragraphs in the agreement, which dealt with petitioners' undertakings for the period after 1976, contained a clause providing for refunds in the event of a future retroactive change in the law regarding the status of the disputed workers (Pet. App. A-3 to A-4).

After petitioners had made substantial payments on the 1970-1976 liability, Congress enacted Section 530 of the Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2885, which provided that any taxpayer then involved in a controversy over the employment status of certain workers, who had a "reasonable basis" for treating these workers as independent contractors, would be relieved of employment tax liability. The statute provided for refunds subject to certain time limitations (Pet. App. A-5).

Pursuant to the new statute, the government abated the remaining unpaid portion of the $545,912.68, and relieved petitioners of their obligation to treat the workers as employees. Petitioners thereupon filed a suit for the refund of the amounts already paid under the agreement (Pet. App. A-6). Petitioners moved for summary judgment and the government filed a cross-motion for summary judgment (Pet. App. C-1). The district court held for petitioners on the ground that the refund clause in the agreement was ambiguous; that the government, as the drafting party, was responsible for the ambiguity; and that, accordingly, the ambiguity was to be resolved against the government. (Pet. App. C-5 to C-6). The court of appeals reversed (Pet App. A-20 to A-21). The court held that petitioners, rather than the government, were the drafting party and that, accordingly, the district court erred in holding the government

responsible for any ambiguity in the agreement. The court further held that given the introductory provision of the refund clause and its position within the compromise agreement as a whole, i.e., appearing in a paragraph dealing only with periods after 1976, petitioners would not be entitled to a refund for amounts paid with reference to the taxable years 1970 to 1976 (Pet. App. A-18 to A-20).

The decision below, involving only the construction of a particular compromise agreement, does not warrant this Court's review. Moreover, the court of appeals correctly held that the compromise agreement did not entitle petitioners to a refund for the years 1970 through 1976. The agreement, drafted and redrafted by petitioners' attorneys, contained several distinct paragraphs, each dealing with one particular aspect of the dispute between petitioners and the government. Only one of these paragraphs dealt with periods beginning with 1977, and it was this paragraph, and only this paragraph, that contained any reference to refunds in the event the applicable law changed retroactively. There was no general clause addressing either refunds or prospective legal changes, although there was a general clause binding petitioners' and successor entities. The court of appeals, therefore, correctly concluded that the refund clause applied only to payments made with reference to taxable years after 1976, and was inapplicable to the payments before the court.

Contrary to petitioners' argument (Pet. 13-14), the decision below does not hold that a contractual ambiguity may be resolved in a summary judgement proceeding. The footnote in the opinion below, on which petitioners rely in support of their contention, means nothing more than that, whatever the meaning of the words used in the refund clause, the position of that clause limits its reach to payments other than those in issue. Thus, the ambiguity of the

language is irrelevant because the location of the clause determines its scope. Accordingly, petitioners' hypotheses regarding the court's resolution of the question whether there was an ambiguity in the refund provision is also irrelevant, because the court did not have to, and did not, address the question.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

NOVEMBER 1982

DOJ-1982-11